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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. MARCELL DARNELL DAVIS et al., Defendants and Appellants.	D034531 (Super. Ct. No. SCD143686)

APPEALS from judgments of the Superior Court of San Diego County, John M. Thompson, Judge. Affirmed.

Marcell Darnell Davis and Henry Esco Puckett appeal their convictions of robbery and other offenses following a joint jury trial. Puckett contends the trial court prejudicially erred by admitting into evidence extrajudicial statements he made to police in violation of *Miranda v. Arizona* (l966) 384 U.S. 436 (*Miranda*). Davis contends the trial court prejudicially erred by (1) admitting into evidence Puckett's insufficiently redacted out-of-court statements, and (2) denying his new trial motion, which was based

on the prosecutor's failure to disclose before trial preferential treatment given a prosecution witness. After oral argument in this appeal, we granted the appellants' motion to submit supplemental briefs on additional issues. In Puckett's supplemental brief, he contends: (1) the trial court erred by not instructing on being armed with a firearm under Penal Code section 12022, subdivision (a)[1] as a lesser included enhancement (LIE) of personally using a firearm under sections 12022.5, subdivision (a)(1) and 12022.53, subdivision (b); (2) he was denied effective assistance of counsel because his counsel did not request an instruction on the section 12022, subdivision (a) LIE; (3) the trial court erred by not instructing on unanimity with CALJIC No. 17.01; and (4) there is insufficient evidence to support the jury's findings that he personally used a firearm in committing his offenses within the meaning of sections 12022.5, subdivision (a)(1) and 12022.53, subdivision (b). In Davis's supplemental brief, he contends there is insufficient evidence to support the jury's findings that he personally used a firearm in committing his offenses within the meaning of sections 12022.5, subdivision (a)(1) and 12022.53, subdivision (b). Puckett and Davis each join in the contentions raised by the other in his initial and supplemental briefs. We affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND

Shortly after 9:00 p.m. on March 18, 1999, two or three men entered a Lucky grocery store. The men wore black clothing and gloves, masked their faces with bandannas, and brandished handguns as they entered. One of the men, wearing a

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1 All statutory references are to the Penal Code.

distinctive hooded jacket, pushed customer Ana Johnson onto the store's floor. One approached cashier Monica Gomez from the rear, stated, "This is a holdup," and demanded that she give him the cash in her cash register. Customer Martha Stella handed the man the $20 bill that she was holding to pay for her groceries.[2] He took approximately $400 in currency and rolled coins from the register. One of the men ordered Gomez and the customers to get down on the floor. One ordered cashier Deborah Thomas and customer John Kienle to get down on the floor.

At about 9:19 p.m. the men left the store, and Thomas called 911 and reported the incident to police. San Diego Police Sergeant Lawrence Cohen was on routine patrol when he received a radio dispatch about the incident. As Cohen drove toward the Lucky store, he saw three vehicles traveling northbound on Clairemont Drive. Two vehicles were traveling side-by-side and the third vehicle was following them about 50 yards behind. The vehicles were in the area Cohen believed the robbery suspects would be had they recently left the Lucky store in a car. Cohen observed that the third vehicle's occupants were black and wore dark clothing similar to the clothing described in the dispatch. The vehicles went in different directions. Cohen followed the third vehicle, a blue Toyota, and called for assistance. As two other patrol cars and a police helicopter joined the pursuit, the Toyota entered westbound Highway 52, then entered southbound I-5, and turned onto Sea World Drive. The Toyota drove toward Fiesta Island and

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2 Customer Ora Herrera was standing in line behind Stella and customer Israel Sotelo was standing in line behind Herrera.

stopped near Mission Bay. Puckett got out of the front passenger side of the Toyota; took off his black, hooded jacket; threw it on the ground and ran into the water. Puckett was apprehended by police; he was in possession of a black nylon cap. A loaded, silver and black Ruger nine-millimeter pistol was found in the water near Puckett. Tyrone Pinckney was in the driver's seat of the Toyota and Davis was in the car's back seat. Pinckney was wearing black clothing with red trim and Davis was wearing all-black clothing. A black knit cap was found in the front passenger's seat and a loaded, black Jennings nine-millimeter pistol was found underneath the driver's seat. Some hooded jackets were found in the car's trunk. None of the money taken from the Lucky store was found in the car or on its occupants. At a curbside lineup, Thomas identified Davis as the man who pointed the gun at her, and Johnson identified Puckett as the man with the distinctive hooded jacket who pushed her down. In a photographic lineup, Kienle tentatively identified Davis as the man who pointed the gun at him.

The trial court denied Davis's motion to sever his trial from Puckett's trial based on extrajudicial statements that codefendant Puckett made to police. However, the trial court redacted Puckett's extrajudicial statements, which were admitted at trial. At trial Mark Oslund testified that he knew Davis and Puckett in Phoenix, Arizona, where he attended school. He considered Davis a friend and Puckett an acquaintance. He had seen Puckett 10 times at most. Davis was the roommate of his friend Demetrious Gibson, also known as "Wood." Oslund had seen Davis and Puckett together rarely and had seen Wood and Puckett together rarely. On January 29, 1999, Oslund purchased two guns from a Phoenix-area pawn shop. One of the guns was a Jennings nine-millimeter pistol

with the serial number 1337879.[3] The other gun was a .40-caliber pistol. In early to mid-February after Oslund had been unsuccessful in selling the guns, he gave them to Wood at Wood's Phoenix apartment. Neither Davis nor Puckett were present at Wood's apartment at that time. On March 2 Oslund falsely reported to police that the two guns had been stolen after his mother found his receipt for the guns and confronted him about it.

Davis was found guilty of conspiracy to commit robbery (count one), robbery (count two), and three counts of assault with a semi-automatic firearm (counts four through six).[4] The jury also found true allegations that he personally used a firearm in committing those offenses.[5]

Puckett was found guilty of conspiracy to commit robbery (count one), robbery (count two), and four counts of assault with a semi-automatic firearm (counts three, five,

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3 Oslund identified the Jennings nine-millimeter pistol found in the Toyota as the same one he bought from the pawnshop, based on its identical serial number and other features.

4 Davis's assaults were against Johnson, Kienle, and Thomas.

5 The trial court dismissed count nine pursuant to section 1118.1 and the jury found Davis not guilty of counts three, seven and eight.

seven and eight).[6] The jury also found true allegations that he personally used a firearm in committing those offenses.[7]

Pinckney was found guilty of conspiracy to commit robbery (count one) and robbery (count two).

Davis was sentenced to a term of 15 years and Puckett was sentenced to a term of 18 years 4 months.

Davis and Puckett each timely filed a notice of appeal.[8]

DISCUSSION

I

Assuming Arguendo the Trial Court Erred by Admitting Puckett's Extrajudicial Statements, That Error Was Not Prejudicial to Puckett

Puckett contends the trial court prejudicially erred by admitting his extrajudicial statements obtained by police in violation of *Miranda*, *supra*, 384 U.S. 436.

A

At about 1:40 a.m. on March 19, 1999, San Diego Police Detectives Heather Petty and Howard Labore interviewed Puckett in an interview room at the police station. The interview was audio- and videotaped. Petty advised Puckett of his *Miranda* rights.

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6 Puckett's assaults were against Johnson, Stella, Herrera, and Sotelo.

7 The trial court dismissed count nine pursuant to section 1118.1 and the jury found Puckett not guilty of counts four and six. In a bifurcated trial, the trial court subsequently found Puckett guilty of being a felon in possession of a firearm (count 10).

8 Pinckney is not a party to these appeals.

Puckett acknowledged he understood those rights. She then asked him: "Do you want to tell us what went down here tonight?" He shook his head side to side, expressing a negative response. Petty then stated that "the bottom line" is that "you guys just got caught"; she told Puckett it was important for him to tell everyone what happened, show remorse, and explain the reasons for his actions. Petty asked him when he arrived in San Diego from Phoenix. He replied, "Yesterday." She asked, "Who'd you come over with?" He replied, "On the bus." Puckett shook his head negatively in response to her questions about who owned the car from which he ran. Labore asked, "Who [Puckett knew] out of the other two guys in the car?" Puckett replied, "Just the one . . . Marcelle . . . . He used to go to school in Phoenix. . . . I met him at the school . . . I am really scared of them people. . . . [and I] know what happens to people who talk. I know I can't say nothing to y'all [sic] right now." Labore then continued to ask him questions about the incident and ask him why he was afraid to talk. Puckett repeatedly replied he was afraid and either that he could not say anything or that he already had said everything he could say. Petty and Labore continued to question him, with little substantive response thereafter from Puckett. They falsely told him that the other two men had implicated him in the robbery. The interview ended at 3:06 a.m.

At about 4:45 a.m. Petty approached Puckett in his holding cell, handed him her business card, explained the charges being made against him, and asked him if he had any questions. She did not readvise him of his *Miranda* rights. Their conversation was not audio- or videotaped. Puckett stated that he would like to help her but he feared for his safety. Petty then asked him specific questions about the robbery and his involvement

in it, which he answered. He admitted that he participated in the robbery and waved a gun while standing in the front of the store. He stated that the Ruger nine-millimeter pistol he threw in Mission Bay was the gun he used in the robbery. Puckett did not make any statements about the involvement or actions of Davis or Pinckney relating to the robbery. This second interview lasted approximately 10 minutes.

Before trial Puckett moved to suppress his extrajudicial statements made during both March 19, 1999, interviews. He argued he refused to talk with police during the first interview, showing he invoked his right to remain silent. The prosecutor argued that Puckett knowingly and voluntarily waived his *Miranda* rights before making those statements and that police were not required to readmonish him of his *Miranda* rights before the second interview. The trial court viewed the videotape of the first interview.[9] The court denied Puckett's motion, finding that he had not invoked his *Miranda* rights and that his waiver of those rights was voluntary.

At trial only the trial court's redacted form of Puckett's second interview statements was admitted. Petty testified in accordance with that redacted form of her interview with Puckett:

> "[Puckett] stated he had never done a robbery like this. He knew a robbery was going to take place tonight, meaning the night prior. He stated that he found out tonight shortly before the robbery took place. He stated that he was the one that went in the store and stood in the front of the store. [¶] At that point when he stated that, he had his right hand in a manner of looking like a gun. And he waved it

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9 The videotape was not admitted into evidence at trial for the jury's viewing or other consideration.

> back and forth in front of him as if he was standing in front of the store waving a pistol back and forth. [¶] He stated he wanted to tell everybody he was very sorry for what he did. He stated he did not bring the gun that he used from Phoenix. He stated[,] 'This is the first night I have seen the gun.' And he stated that he used the Ruger [nine-]millimeter that he threw in the bay. And he stated he did not mean to hurt or scare anybody. And he then wanted to tell everybody that he was sorry for his actions."

B

"Under the familiar requirements of *Miranda*, designed to assure protection of the federal Constitution's Fifth Amendment privilege against self-incrimination under 'inherently coercive' circumstances, a suspect may not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and to appointed counsel in the event the suspect is indigent. [Citations.] Once having invoked these rights, the accused 'is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.' [Citation.]" (*People v. Sims* (1993) 5 Cal.4th 405, 440.)

After an individual is admonished of his or her *Miranda* rights, "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he [or she] wishes to remain silent, the interrogation must cease." (*Miranda*, *supra*, 384 U.S. at pp. 473-474, fn. omitted.) "[N]o particular form of words or conduct is necessary on the part of a suspect in order to invoke his or her right to remain silent [citation], and the suspect may invoke this right by any words or conduct reasonably inconsistent with a present willingness to discuss the case freely and completely. [Citation.]" (*People v.*

Crittenden (1994) 9 Cal.4th 83, 129.) "However, if the defendant's invocation of the right to remain silent is ambiguous, the police may continue questioning [the defendant] for the limited purpose of clarifying whether he or she is waiving or invoking those rights, although they may not persist 'in repeated efforts to wear down his resistance and make him change his mind.'" (*People v. Peracchi* (2001) 86 Cal.App.4th 353, 360, fns. omitted.)

In reviewing a trial court's finding whether a defendant knowingly and intelligently waived his or her *Miranda* rights, "[w]e must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. [Citations.] However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained." (*People v. Boyer* (1989) 48 Cal.3d 247, 263, disapproved on another ground in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.) "Whether a suspect has invoked his right to silence is a question of fact to be determined in light of all of the circumstances, and the words used must be considered in context." (*People v. Peracchi, supra,* 86 Cal.App.4th at pp. 359-360, fn. omitted.) We apply federal standards in reviewing a defendant's claim that extrajudicial statements were elicited from him or her in violation of *Miranda*. (*Id*. at p. 360; *People v. Bradford* (1997) 14 Cal.4th 1005, 1033.) Extrajudicial statements obtained in violation of *Miranda* are inadmissible to establish the defendant's guilt. (*People v. Sims, supra,* 5 Cal.4th at p. 440.) However, the erroneous admission of extrajudicial statements obtained in violation of *Miranda* is *not* per se reversible error. (*Id*. at p. 447; *People v. Johnson*

(1993) 6 Cal.4th 1, 32-33.) Rather, we apply the harmless error analysis of *Chapman v. California* (1967) 386 U.S. 18, 24 to determine whether reversal is required. (*People v. Sims*, *supra*, at p. 447; *People v. Johnson*, *supra*, at pp. 32-33; *People v. Peracchi*, *supra*, at p. 363.) Under the *Chapman* standard, an error is reversible unless it is harmless beyond a reasonable doubt.

C

We assume arguendo that Puckett invoked his *Miranda* rights at the beginning of the first March 19, 1999, interview and that he did not subsequently waive those rights during either the first or second interview. Assuming arguendo Puckett invoked his *Miranda* rights, the trial court erred by admitting Puckett's redacted extrajudicial statements during his second interview. However, considering the entire record in this case, we conclude the assumed error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Witnesses in the Lucky store testified at trial that three black men, brandishing guns, entered the store and robbed Gomez at gunpoint. The men wore black clothing, black beanies or caps, gloves, and bandannas or other face-masking apparel. Thomas identified, and Gomez tentatively identified, Davis as one of the three men. Johnson identified Puckett as one of the three men by the distinctive hooded jacket he wore. Witnesses observed Davis brandishing a black gun similar to a Jennings nine-millimeter pistol during the robbery. Following a prompt 911 call and radio dispatch, Cohen observed a car with two men matching the description of the robbers traveling away from the area of the Lucky store. He followed that car as it traveled toward and stopped at Mission Bay. Puckett ran out of the car; pulled off and

threw down a black, hooded jacket; and ran into the water. A Ruger nine-millimeter pistol was found in the water near Puckett. A black nylon cap or beanie was found on Puckett. Davis, dressed in all-black clothing, was in the car's back seat, near the Jennings nine-millimeter pistol found underneath the driver's seat. Pinckney, dressed in black clothing, was in the driver's seat. Black, hooded jackets were found in the car's trunk. Considering the witnesses' descriptions and identifications of the three men, the evasive actions taken by the car and Puckett immediately after the robbery, the black clothing and other apparel worn by or found with the defendants, the Ruger nine-millimeter pistol found in the water, the Jennings nine-millimeter pistol found in the car, and other strong incriminating evidence, we conclude the assumed error in admitting Puckett's redacted extrajudicial statements during the second interview was harmless beyond a reasonable doubt. (*Ibid*.) We are convinced beyond a reasonable doubt that the assumed error did not contribute to the verdict. (*Ibid*.)[10]

II

The Trial Court Properly Denied Davis's Motion to Exclude Puckett's Redacted Extrajudicial Statements; In Any Event, Any Error Was Harmless

Davis contends the trial court prejudicially erred by denying his motion to exclude Puckett's redacted extrajudicial statements. He argues that admission of Puckett's redacted statements violated his Sixth Amendment right to confront witnesses.

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10 Alternatively stated, we conclude there is no reasonable possibility that the admission of Puckett's redacted extrajudicial statements contributed to his convictions. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

A

Before trial Davis moved to sever his trial from Puckett's trial on the ground Puckett made extrajudicial statements that incriminated Davis. The trial court denied the severance motion, but redacted Puckett's extrajudicial statements to eliminate references to Davis or other accomplices. The trial court overruled Davis's hearsay objection to, and Petty testified on, Puckett's redacted statements as set forth in part I.A., *ante*. During Petty's cross-examination, the trial court gave the following limiting instruction:

> "The statement allegedly attributed to Mr. Puckett is offered by the People only as against Mr. Puckett. You cannot consider anything in that statement for purposes of your determination as to the guilt or innocence of Mr. Davis or Mr. Pinckney. You can use it only for the limited purpose of determining the guilt or innocence of Mr. Puckett."

On conclusion of the trial, the court again gave a limiting instruction (i.e., CALJIC No. 2.07).

B

People v. Aranda (1965) 63 Cal.2d 518, 528-530 (abrogated by constitutional amendment on another ground as noted in *People v. Fletcher* (1996) 13 Cal.4th 451, 465) held that joint trials of multiple defendants were permissible if extrajudicial statements of defendants admitted at trial effectively deleted direct or indirect identifications of codefendants. *Bruton v. United States* (1968) 391 U.S. 123, 127, 134-136 held that a defendant's Sixth Amendment right of confrontation is denied when a nontestifying codefendant's extrajudicial statement naming, or "powerfully incriminating," the defendant as a participant in the crime is admitted at their joint trial, even if a limiting

instruction is given on the jury's consideration of that statement against only the codefendant. *Richardson v. Marsh* (1987) 481 U.S. 200, 211 limited the *Bruton* rule, holding: "[T]he Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when . . . the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." (Fn. omitted.) It concluded the Confrontation Clause was not violated even though other evidence linked the defendant to the codefendant's properly redacted confession.[11] (*Id*. at pp. 202, 208.)

In *People v. Fletcher* (1996) 13 Cal.4th 451, 456-457, 469, the California Supreme Court addressed the issue left unresolved by the United States Supreme Court in *Richardson* and concluded a redaction replacing the defendant's name with the word "friend" in a codefendant's confession violated the defendant's Sixth Amendment right of confrontation because jurors could not avoid drawing the inference that the defendant was the unnamed person mentioned in the codefendant's confession. *Fletcher* concluded:

> "[W]hether this kind of editing--which retains references to a coparticipant in the crime but removes references to the coparticipant's name--sufficiently protects a nondeclarant defendant's constitutional right of confrontation may not be resolved by a 'bright line' rule of either universal admission or universal exclusion. Rather, the efficacy of this form of editing must be determined on a case-by-case basis in light of the other evidence that has been or is likely to be presented at the trial. The editing will be deemed insufficient to avoid a confrontation violation if, despite the

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11 *Richardson* expressly noted that it did not "express [any] opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." (*Id*. at p. 211, fn. 5.)

> editing, *reasonable jurors could not avoid drawing the inference that the defendant was the coparticipant designated in the confession by symbol or neutral pronoun*." (*Id*. at p. 456, italics added.)

In *Gray v. Maryland* (1998) 523 U.S. 185, 188, 192, 197, the United States Supreme Court addressed the issue left unresolved in *Richardson*, holding that substituting blanks and the words "deleted" or "deletion" for the defendant's name in a codefendant's confession violated its *Bruton* rule. Despite those redactions, the codefendant's confession was directly accusatory and "refer[red] directly to the 'existence' of the nonconfessing defendant." (*Id*. at pp. 192, 194.) Unlike in *Richardson*, the "inferences at issue [in *Gray*] involve statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and [that] involve inferences . . . a jury ordinarily could make immediately, even were the confession the very first item introduced at trial." (*Id*. at p. 196.) Furthermore, *Gray* concluded that the redacted confession "with the blank prominent on its face, in *Richardson*'s words, '*facially* incriminat[es]' the codefendant." (*Ibid*., italics added by *Gray*.) *Gray* appeared to suggest that an alternative form of redaction would not have violated the defendant's Sixth Amendment right of confrontation:

> "Why could the witness not, instead, have said: [¶] 'Question: Who was in the group that beat Stacey? [¶] 'Answer: Me and a few other guys.' " (*Ibid*.)

The court concluded that whether a redaction satisfies *Richardson* "depend[s] in significant part upon the *kind* of, and not the simple *fact* of, inference" and that the redacted confession in *Gray* obviously referred to the defendant. (*Ibid*., italics added.)

C

Davis asserts his Sixth Amendment right of confrontation was violated by admission of Puckett's redacted extrajudicial statements because they "raised an inescapable inference that [Davis] was the man who brought over the Jennings [nine-] millimeter [pistol] from Phoenix, Arizona, and that Puckett had been told about the robbery by [Davis], as they were friends." Davis argues that Puckett's redacted statements, when considered in the context of Oslund's testimony and other evidence, unmistakably refer to Davis.

We conclude Puckett's redacted extrajudicial statements did not obviously or directly refer to Davis and reasonable jurors could avoid drawing the inference that Davis was the coparticipant referred to in Puckett's statements. Puckett's redacted statements conveyed by Petty included the statements that Puckett "did not bring the gun that he used from Phoenix" and that the evening of March 18, 1999, was the first time he saw the Ruger nine-millimeter pistol that he used during the robbery and later threw in the bay. On its face, Puckett's statement simply means that Puckett did not bring the *Ruger* pistol that he used in the robbery from Phoenix. Puckett made *no* reference to the *Jennings* nine-millimeter pistol that Davis apparently used during the robbery. Therefore, reasonable jurors could easily avoid an inference from Puckett's redacted statements that Davis had anything to do with the *Ruger* pistol. Furthermore, although Oslund testified that he bought the *Jennings* nine-millimeter pistol in January 1999 and later gave it to Wood, that testimony did not require an inference by the jury, either from Puckett's redacted statements or from Oslund's testimony, or both, that Davis was the person who

must have brought the *Jennings* pistol from Phoenix and/or used it during the robbery. Although Davis was Wood's roommate, other inferences could have been made from Oslund's testimony and Puckett's redacted statements other than that Wood must have given the *Jennings* pistol to Davis. Oslund was also acquainted with Puckett and had seen him approximately 10 times (apparently in Phoenix). Oslund also had seen Puckett and Wood together. Davis was in San Diego when Oslund gave Wood the Jennings pistol. It is possible that Wood may have given the Jennings pistol to someone other than Davis. He may have given it to Puckett or another person who took it to San Diego. Furthermore, even if Wood gave the Jennings pistol to Davis, it need not necessarily be inferred that Davis was the person who took it to San Diego and/or used it during the robbery. Rather, considering Oslund's testimony, it would have been speculative for the jury to infer that Puckett's redacted extrajudicial statements referred to Davis as an accomplice and the person who used the Jennings pistol.

Davis also argues that Puckett's redacted statements supported an unavoidable inference that Davis was the person who must have told Puckett about the robbery plan shortly before its occurrence. Although Puckett stated he found out about the robbery plan only shortly before it took place, reasonable jurors could avoid the inference that Puckett's statement referred to Davis as the person who told him about the plan. There were other inferences that could have been made by the jurors. They could have inferred that Pinckney or an uncharged person had informed Puckett of the robbery or the jurors could have disbelieved Puckett's statement.

Because Puckett's redacted extrajudicial statements did not obviously or directly refer to Davis and reasonable jurors could avoid drawing the inference that Davis was a coparticipant or otherwise referred to in Puckett's statements, we conclude the trial court's admission of those statements did not violate Davis's Sixth Amendment right of confrontation.[12] (*Bruton v. United States*, *supra*, 391 U.S. at pp. 134-136; *Richardson v. Marsh*, *supra*, 481 U.S. at pp. 202, 207-208, 211; *People v. Fletcher*, *supra*, 13 Cal.4th at pp. 456-457, 469; *Gray v. Maryland*, *supra*, 523 U.S. at p. 196.)

D

Davis also asserts that the trial court erred by admitting Puckett's redacted extrajudicial statements because those statements were not sufficiently reliable and trustworthy under *Lilly v. Virginia* (1999) 527 U.S. 116. However, *Lilly* is inapposite to this case and does not preclude the admission of Puckett's redacted extrajudicial statements. In this case, the defendants were jointly tried and Puckett's statements were admitted solely against him, and not against Davis or Pinckney. The trial court twice gave a limiting instruction that Puckett's statements could be considered only against him, and not against Davis or Pinckney. In *Lilly*, the defendant was tried separately and the accomplice's extrajudicial statements were admitted in defendant's separate trial on the ground that the accomplice's statements were declarations of an unavailable witness against penal interest. (*Id*. at p. 121.) Furthermore, the accomplice's statements in *Lilly*

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12 *People v. Barrett* (1968) 267 Cal.App.2d 135, cited by Davis, is inapposite and does not persuade us to conclude otherwise.

were self-serving and expressly implicated the defendant as the primary instigator of the offenses. (*Ibid*.) In this case, Puckett's redacted statements did not shift the blame to or expressly or directly inculpate Davis or others, but simply admitted Puckett's actions during the robbery. Therefore, the prosecution was not required to show Puckett's redacted statements had sufficient guarantees of trustworthiness or reliability for admission against Puckett. (*Id*. at pp. 136-139.) The principles discussed in *Lilly* do not apply in the circumstances of this case.[13]

E

Assuming arguendo the trial court violated the *Bruton* or *Lilly* rules by admitting Puckett's redacted extrajudicial statements, we nevertheless conclude that error was harmless beyond a reasonable doubt as to Davis.[14] In part I.C., *ante*, we concluded the admission of Puckett's redacted statements did not prejudice Puckett and we apply a similar analysis in concluding the assumed *Bruton* or *Lilly* error did not prejudice Davis. Witnesses at the Lucky store testified that three black men, brandishing guns, entered the store and robbed Gomez at gunpoint. The men wore black clothing, black beanies or caps, gloves, and bandannas or other face-masking apparel. Thomas identified, and

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13 Furthermore, we note that only a plurality of four justices concurred in the relevant substantive portions of the *Lilly* opinion. (*Lilly v. Virginia*, *supra*, 527 U.S. at p. 120.) A majority of the justices joined only the factual and jurisdictional portions and the result of the opinion. (*Id*. at pp. 120-123, 139-140.)

14 Also assuming arguendo the trial court violated Puckett's *Miranda* rights by admitting his redacted statements, as jointly contended by Davis on appeal, we similarly conclude that error was harmless beyond a reasonable doubt as to Davis based on the analysis discussed *post*.

Gomez tentatively identified, Davis as one of the three men. Johnson identified Puckett as one of the three men by the distinctive hooded jacket he wore. Witnesses observed Davis brandishing a black gun similar to a Jennings nine-millimeter pistol during the robbery. Following a prompt 911 call and radio dispatch, Cohen observed a car with two men matching the description of the robbers traveling away from the area of the Lucky store. He followed that car as it traveled toward and stopped at Mission Bay. Puckett got out; pulled off and threw down a black, hooded jacket; and ran from the car into the water. A Ruger nine-millimeter pistol was found in the water near Puckett. A black nylon cap or beanie was found on Puckett. Davis, dressed in all-black clothing, was in the car's back seat, near the Jennings nine-millimeter pistol found underneath the driver's seat. Pinckney, dressed in black clothing, was in the driver's seat. Black, hooded jackets were found in the car's trunk. At trial, the jury was twice given a limiting instruction to consider Puckett's statements against only him and not against Davis or Pinckney. We presume the jury followed those limiting instructions. Furthermore, as discussed in part II.B., *ante*, Puckett's redacted statements did not obviously or directly implicate Davis. Rather, they were admissions of Puckett's actions before, during and after the robbery. The possible prejudicial effect of Puckett's redacted statements against Davis was minimal, and when that minimal effect is considered against the other evidence of Davis's guilt, including the witnesses' descriptions and identifications of the three men, the evasive actions taken by the car and Puckett immediately after the robbery, Davis's presence in the car's back seat, the black clothing and other apparel worn by or found with the defendants, the Ruger nine-millimeter pistol found near Puckett in the water, the

Jennings nine-millimeter pistol found in the car near Davis, and other strong incriminating evidence, we conclude the assumed error (i.e., the admission of Puckett's redacted extrajudicial statements) was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) We are convinced beyond a reasonable doubt that the assumed error did not contribute to the verdict against Davis. (*Ibid*.)

III

The Trial Court Properly Denied Davis's New Trial Motion

Davis contends the trial court erred by denying his motion for new trial on the ground of a *Brady*[15] violation, consisting of the prosecution's failure to disclose before trial favorable treatment received by Oslund, a prosecution witness. The People concede that it violated *Brady* by not disclosing before trial Oslund's favorable treatment, but assert that Davis was not prejudiced by that violation and therefore the trial court properly denied Davis's new trial motion.

A

At a hearing on August 30, 1999, after the conclusion of the trial, the prosecutor stated that he had mistakenly failed to disclose before or during trial certain favorable treatment that Phoenix police apparently gave Oslund for cooperating with the prosecutor in this case. The prosecutor stated that when he first spoke to Oslund one and one-half months before trial, Oslund admitted he had falsely reported to Phoenix police that his two guns had been stolen. Oslund told the prosecutor that he was concerned about being

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15 *Brady v. Maryland* (1963) 373 U.S. 83.

prosecuted for filing a false police report. Petty traveled to Phoenix and spoke with Phoenix authorities about the situation, and the prosecutor thereafter was informed that Oslund would not be prosecuted for filing the false police report. The prosecutor did not disclose to Davis before or during his trial that Oslund was given this favorable treatment by Phoenix authorities. The prosecutor stated that it had only recently occurred to him that Oslund's treatment by Phoenix authorities could be considered favorable treatment that should have been disclosed to Davis before trial.

On September 10, 1999, Davis filed a motion for new trial based on the prosecutor's nondisclosure before trial of Oslund's favorable treatment. At the hearing on Davis's motion, the trial court revealed that since the August 30, 1999, hearing, it had an ex parte telephone conversation with Oslund to discuss the circumstances of Oslund's favorable treatment. The court summarized for the parties the substance of its conversation with Oslund. Although the trial court found that the prosecutor had committed a discovery violation, it denied Davis's new trial motion, reasoning:

> "The mere fact that there's a discovery violation does not, obviously, equate to a new trial grant. [¶] . . . [¶] [T]he test is not whether the defendants would more likely than not have received a different verdict with this evidence, but rather in the absence of that evidence these defendants received a fair trial. [¶] . . . [¶] Frankly, I find nothing in the moving papers, in the responsive pleadings, or in my recollection of the evidence in this case to find that the defendants did not receive a fair trial in this case. This verdict could have easily been reached if Mr. [Oslund] had never been on the scene in this case given the other evidence against these individuals. [¶] [O]n the whole, I see no due process violation."

B

"[T]he suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is *material* either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (*Brady v. Maryland*, *supra*, 373 U.S. at p. 87, italics added.) "Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. [Citations.]" (*Strickler v. Greene* (1999) 527 U.S. 263, 280.) "There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." (*Id*. at pp. 281-282.) *Strickler* stated:

> "[T]he term '*Brady* violation' is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence--that is, to any suppression of so-called '*Brady* material'--although, strictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that *there is a reasonable probability that the suppressed evidence would have produced a different verdict*." (*Id*. at p. 281, italics added, fn. omitted.)

Restated, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." (*Kyles v. Whitley* (1995) 514 U.S. 419, 434; *Strickler v. Greene*, *supra*, at pp. 289-290.) The defendant must show "that the favorable [nondisclosed] evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." (*Kyles v. Whitley*, *supra*, at p. 435, fn. omitted.)

C

The People concede, and we agree, that the trial court correctly found the prosecutor's failure to disclose before trial Oslund's favorable treatment violated his *Brady* disclosure duty. However, Davis does not carry his appellate burden to show that the prosecutor's nondisclosure of that information was *material*, as that term is used in *Brady* and its progeny, and therefore prejudicial to him. Considering the whole record in this case, we conclude that, had the favorable evidence been disclosed to Davis and used to impeach Oslund or otherwise by Davis, it is not reasonably probable he would have received a different verdict. (*Strickler v. Greene*, *supra*, 527 U.S. at p. 281.) Davis does not argue that Oslund's testimony at trial was false. Because of the strong evidence of the actions of Davis and his two codefendants during and after the robbery as described in part II.E., *ante*, the impeachment or absence of Oslund's testimony would not have affected the result at trial. Oslund's testimony was not crucial to the prosecution's case. Although it may have provided some support for an inference that Davis used the Jennings pistol during the robbery, witnesses identified Davis as one of the robbers and as the one who used the gun that looked similar to the Jennings pistol. Furthermore, the Jennings pistol was found underneath the driver's seat in the Toyota, which presumably was within Davis's reach from the back seat where he was found. The favorable impeaching evidence regarding Oslund, when considered with the slight discrepancies cited by Davis in the victims' descriptions and identifications of the robbers, is insufficient to undermine our confidence in the verdict. (*Kyles v. Whitley*, *supra*, 514 U.S. at pp. 434-435.) It is not reasonably probable Davis would have received a different

verdict had the favorable information been disclosed by the prosecutor; Davis was not deprived of a fair trial. (*Strickler v. Greene*, *supra*, at pp. 281; *Kyles v. Whitley*, *supra*, at p. 434.) Therefore, Davis has not shown that the prosecutor's *Brady* nondisclosure violation was material and requires reversal of his convictions.[16]

IV

The Trial Court Did Not Err by Omitting to Instruct on the Lesser Included Enhancement of Being Armed With a Firearm Under Section 12022, Subdivision (a)

In Puckett's supplemental brief, he contends the trial court erred by not instructing on being armed with a firearm (§ 12022, subd. (a))[17] as an LIE of personally using a firearm (§§ 12022.5, subd. (a)(1), 12022.53, subd. (b)).[18]

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16 Davis does not substantively argue in his opening brief that the trial court's ex parte communications with Oslund require reversal of his convictions. We decline to address his newly raised substantive argument on that issue contained in his supplemental reply brief.

17 Section 12022, subdivision (a) provides: "(1) . . . [A]ny person who is armed with a firearm in the commission . . . of a felony shall . . . in addition and consecutive to the punishment prescribed for the felony . . . of which he or she has been convicted, be punished by an additional term of one year, unless the arming is an element of the offense of which he or she was convicted. This additional term shall apply to any person who is a principal in the commission . . . of a felony if one or more of the principals is armed with a firearm, whether or not the person is personally armed with a firearm."

18 Section 12022.5, subdivision (a)(1) provides: "[A]ny person who personally uses a firearm in the commission . . . of a felony shall, upon conviction of that felony . . . , in addition and consecutive to the punishment prescribed for the felony . . . of which he or she has been convicted, be punished by an additional term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of the offense of which he or she was convicted."

Section 12022.53, subdivision (b) provides: "[A]ny person who is convicted of a felony specified in subdivision (a) [e.g., section 211 robbery], and who in the commission of that felony personally used a firearm, shall be punished by a term of imprisonment of

Puckett does not assert, and the record does not show, that he requested the trial court instruct on the LIE of being armed with a firearm under section 12022, subdivision (a). In *People v. Majors* (1998) 18 Cal.4th 385, 410-411, the California Supreme Court held that trial courts do *not* have a sua sponte obligation to instruct on lesser included enhancements and, in particular, on being armed with a firearm under section 12022, subdivision (a) as a lesser included enhancement of personally using a firearm under section 12022.5, subdivision (a). Because the trial court did not have a sua sponte obligation to instruct on the LIE of being armed with a firearm and Puckett did not request that LIE instruction, the trial court did not err by not instructing on that LIE. (*Majors, supra*.)

V

Puckett Does Not Show He Was Denied Effective Assistance of Counsel

In Puckett's supplemental brief, he contends that if the trial court did not err by omitting an instruction on the LIE of being armed with a firearm, he was denied effective assistance of counsel because his counsel did not request an instruction on that LIE.

A

A criminal defendant is constitutionally entitled to effective assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *Strickland v. Washington* (1984) 466 U.S. 668, 684-685; *People v. Pope* (1979) 23 Cal.3d 412, 422.) To show denial of the

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10 years in the state prison, which shall be imposed in addition and consecutive to the punishment prescribed for that felony. The firearm need not be operable or loaded for this enhancement to apply."

right to counsel, a defendant must show: (1) his or her counsel's performance was below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance prejudiced the defendant. (*Strickland, supra,* at pp. 687, 691-692; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217; *Pope, supra,* at p. 425, disapproved on another ground by *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10.) To show prejudice, a defendant must show there is a reasonable probability that he or she would have received a more favorable result had his or her counsel's performance not been deficient. (*Strickland, supra,* at pp. 693-694; *Ledesma*, *supra*, at pp. 217-218.) "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the [trial counsel's] errors, the factfinder would have had a reasonable doubt respecting guilt." (*Strickland, supra,* at p. 695.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome. [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 215.) It is the defendant's burden on appeal to show that he or she was denied effective assistance of counsel and is entitled to relief. (*Ledesma*, *supra*, at p. 218.)

"In evaluating a defendant's claim of deficient performance by counsel, there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' [citations], and we accord great deference to counsel's tactical decisions. [Citation.] . . . Accordingly, a reviewing court will reverse a conviction on the ground of inadequate counsel 'only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.' [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 979-980.)

B

We assume arguendo that there could not have been any rational tactical reason for Puckett's counsel to not request an instruction on the LIE of being armed with a firearm and that his counsel's performance was deficient. However, Puckett does not show that it is reasonably probable he would have received a more favorable result had his counsel requested that LIE instruction. He does not show that it is reasonably probable the jury would not have found true one or more of the personal firearm use allegations had it been given the option of considering allegations that he was only armed with a firearm when he committed his offenses. To the extent that he asserts there is insufficient evidence to support the jury's findings of his personal firearm use, we reject that assertion in part VI., *post*. Furthermore, contrary to his assertion, there is evidence in addition to Johnson's identification of his distinctive black jacket showing he personally used a firearm in committing his offenses as discussed in part VI., *post*. To the extent he asserts there was sufficient evidence that he was armed with a firearm, that assertion does not show either that there is insufficient evidence to support the personal use findings or that it is reasonably probable the jury would have found true only the LIE's of being armed with a firearm. Because Puckett does not show he was prejudiced by his counsel's assumed deficient performance, he was not denied effective assistance of counsel. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 693-694; *Ledesma*, *supra*, 43 Cal.3d at pp. 217-218.)

VI

There Is Substantial Evidence to Support the Jury's Findings That Puckett Personally Used a Firearm in Committing His Offenses

In Puckett's supplemental brief, he contends there is insufficient evidence to support the jury's findings that he personally used a firearm in committing the offenses.

A

A judgment must be reversed if the record does not contain substantial evidence to support it. (*People v. Towler* (1982) 31 Cal.3d 105, 117-118; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) *People v. Cuevas* (1995) 12 Cal.4th 252 described the substantial evidence standard of review set forth in *Johnson*:

> "Under this standard, the court 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses *substantial evidence*--that is, evidence [that] is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.] The focus of the substantial evidence test is on the *whole* record of evidence presented to the trier of fact, rather than on ' "isolated bits of evidence." ' [Citation.]" (*Id*. at pp. 260-261, original italics.)

The same standard of review applies whether the conviction is based solely or primarily on circumstantial evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) It also applies to "claims of alleged deficiencies in proof of identity." (*People v. Thompson* (1980) 27 Cal.3d 303, 323, fn. 25, disapproved on another ground as noted in *People v. Rowland* (1992) 4 Cal.4th 238, 260.) Identification of an assailant is a question for the trier of fact and its determination of that question must be sustained on appeal if there is substantial evidence to support it. (*People v. Rist* (1976) 16 Cal.3d 211, 216, superseded

by constitutional amendment on another ground as noted in *People v. Collins* (1986) 42 Cal.3d 378, 393.) *People v. Lindsay* (1964) 227 Cal.App.2d 482 stated:

> "The strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if there were any, the uncertainty of recollection, and the qualification of identity and lack of positiveness in testimony are matters [that] go to the weight of the evidence and the credibility of the witnesses, and are for the observation and consideration, and directed solely to the attention of the jury . . . . The general rule, then, is that it is not essential that a witness be free from doubt as to one's identity. He may testify that in his belief, opinion or judgment the accused is the person who perpetrated the crime, and the want of positiveness goes only to the weight of the testimony. [Citations.] Our courts have held that it is not necessary that any of the witnesses called to identify the accused should have seen his face. [Citation.] Identification based on other peculiarities may be reasonably sure. Consequently, the identity of a defendant may be established by proof of any peculiarities of size, appearance, similarity of voice, features or clothing. [Citations.]" (*Id*. at pp. 493-494.)

In applying the substantial evidence standard of review, "an appellate court may not substitute its judgment for that of the jury. If the circumstances reasonably justify the jury's findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding. [Citations.]" (*People v. Ceja* (1993) 4 Cal.4th 1134, 1139.)

B

Personal use of a firearm "in the commission" of a felony means "during and in furtherance of the felony." (*In re Tameka C.* (2000) 22 Cal.4th 190, 198.) Personal use of a firearm means that the defendant intentionally displayed it in a menacing manner or shot or struck someone with the firearm. (*People v. Wims* (1995) 10 Cal.4th 293, 302.) Personal use of a firearm does *not* require actual shooting of the firearm or pointing it

directly at a victim. (*People v. Granado* (1996) 49 Cal.App.4th 317, 322, 325.) Rather, the question is whether the defendant took some *action* with the gun in furtherance of the commission of the felony. (*Id*. at pp. 324-325, fn. 7.) "[T]he term 'use' . . . should be broadly construed, consistent with common usage, to check the magnified risk of serious injury [that] accompanies any deployment of a gun in a criminal endeavor." (*Id*. at p. 322, fn. omitted.) *Granado* stated: "[W]hen a defendant deliberately shows a gun, or otherwise makes its presence known, and there is no evidence to suggest any purpose other than intimidating the victim (or others) so as to successfully complete the underlying offense, the jury is entitled to find a facilitative use rather than an incidental or inadvertent exposure." (*Id*. at p. 325.) In the circumstances of *Granado*, "[a]fter the victims ignored [the defendant's] initial demands for money, he removed the gun from his waistband, repeated his demands, and returned the gun to his waistband." (*Ibid*.) *Granado* alternatively described the defendant's conduct: "Holding the gun in front of himself, but without pointing it at anyone, defendant persisted in demanding money" from the victims. (*Id*. at p. 320.) *Granado* concluded that the defendant's conduct "was sufficient to establish 'use' within the contemplation of section 12022.5(a)." (*Id*. at p. 325.)

C

We conclude there is substantial evidence to support the jury's findings that Puckett personally used a firearm in the commission of each felony of which he was convicted. Regarding Puckett's conviction of assaulting Johnson, the record shows that Johnson identified Puckett as the man who pushed her down as he and one or two other

men entered the store. She identified Puckett by the distinctive bulky, black jacket he wore during the incident. That jacket had a distinctive design consisting of horizontal material across its back. Johnson testified that all of the men held guns pointing outward as they entered the store. She testified that Puckett was holding a gun at the time he pushed her down onto the floor. Because the record supports an inference that Puckett intentionally displayed a firearm in a menacing manner by pointing it outward when he pushed Johnson down, there is substantial evidence to support the jury's finding that he personally used a firearm in committing the assault on Johnson.[19]

Regarding Puckett's robbery conviction, the record supports the inference that Puckett was the man who displayed the silver and black gun while standing immediately behind Gomez and demanding the cash from her register. After the robbery and car chase, a Ruger pistol was found in the water near where Puckett was apprehended. The Ruger pistol was silver (or chrome) and black. The other gun that was found in the car near Davis, the Jennings pistol, was all black. Stella testified that the man behind Gomez held a gun that was silver with black trim that appeared to be similar to the Ruger pistol. Stella also testified that man wore dark clothing with a scarf on his head. That scarf was made of smooth material. Herrera testified that the man wore a black beanie and held a

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19 Puckett argues the record did not show that two guns were pointed at Johnson. However, personal use of a firearm does not require that a gun be *pointed* at a victim. It is sufficient if a gun is intentionally displayed in a menacing manner. (*People v. Wims*, *supra*, 10 Cal.4th at p. 302; *People v. Granado, supra,* 49 Cal.App.4th at pp. 322, 325.) Johnson testified that the men, including Puckett, held their guns pointed outward. That manner of display is sufficient to support the jury's finding that Puckett personally used a firearm in assaulting her.

silver or chrome-colored gun. A black, nylon "do-rag" cap was found on Puckett after the robbery. Stella testified that the man behind Gomez pointed the silver and black gun in the general direction of Gomez and the three customers (including Stella) standing in her line. Because the record supports an inference that Puckett intentionally displayed a firearm in a menacing manner while demanding the cash in Gomez's register, there is substantial evidence to support a finding that Puckett personally used a firearm in the commission of the robbery. Although the record may also have supported an alternative inference that Davis or another man was the person who stood immediately behind Gomez, we construe the evidence favorably to support the judgment and make all reasonable inferences in support of the judgment.[20]

Regarding Puckett's convictions for assaulting Stella, Sotelo, and Herrera, the record supports the inference that Puckett pointed a gun in their general direction during his robbery of Gomez. Stella testified that the man with the black scarf and silver and black gun pointed the gun in the general direction of the three customers in line (i.e., Stella, Sotelo, and Herrera). Stella testified that the man announced, "This is a holdup," and then demanded money from Gomez. Stella handed a $20 bill to the man. The man

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20 Puckett argues the record does not show that two guns were pointed at Gomez. However, personal use of a firearm does not require that a gun be *pointed* at a victim. It is sufficient if a gun is intentionally displayed in a menacing manner. The record shows that there were at least two men involved in robbing Gomez; one pointed a silver and black gun and the other pointed a black gun. Stella testified that the man with the silver and black gun pointed the gun in the general direction of Gomez and the three customers in her line. That manner of display is sufficient to support the jury's finding that Puckett personally used a firearm in robbing Gomez.

with the silver and black gun was only a few feet from the customers in line when he pointed it in their general direction. Herrera testified that the man pointed a silver or chrome-colored gun at the three customers. Because the record supports an inference that Puckett intentionally displayed a firearm in a menacing manner while assaulting Stella, Sotelo, and Herrera, there is substantial evidence to support the jury's findings that Puckett personally used a firearm in assaulting them. Although the record may also support an alternative inference that Davis or another man was the person who stood immediately behind Gomez and pointed a gun toward her three customers, we construe the evidence favorably to support the judgment and make all reasonable inferences in support thereof.

Regarding Puckett's conviction for conspiracy, the jury found that one of the overt acts that Puckett committed in furtherance of the conspiracy was that he "pointed a firearm at Lucky[] Supermarket employees and customers." Furthermore, the evidence supports an inference that Puckett intentionally displayed a firearm in a menacing manner from the moment he entered the store with his coconspirator(s). Therefore, there is substantial evidence to support a finding that Puckett personally used a firearm in committing the conspiracy offense.

VII

Puckett Does Not Show the Trial Court Erred by Not Instructing on Unanimity With CALJIC No. 17.01

In Puckett's supplemental brief, he contends the trial court prejudicially erred by not instructing sua sponte with CALJIC No. 17.01[21] that the jurors must unanimously agree on the particular act that constituted personal use of a firearm in commission of each felony.[22] Because jurors could have found more than one act constituted that personal use, Puckett argues CALJIC No. 17.01 should have been given by the trial court sua sponte.

A

People v. Melhado (1998) 60 Cal.App.4th 1529 set forth the general rule for when a unanimity instruction is required:

> "When an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act. [Citation.] The

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21 CALJIC No. 17.01 states: "The defendant is accused of having committed the crime of ___ [in Count _]. The prosecution has introduced evidence for the purpose of showing that there is more than one [act] [or] [omission] upon which a conviction [on Count _] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he] [she] committed any one or more of the [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count _], all jurors must agree that [he] [she] committed the same [act] [or] [omission] [or] [acts] [or] [omissions]. It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict."

22 Because the record does not show that Puckett requested CALJIC No. 17.01, we assume that he contends the trial court had a *sua sponte* duty to so instruct.

> duty to instruct on unanimity when no election has been made rests upon the court sua sponte. [Citation.]" (*Id.* at p. 1534.)

No unanimity instruction is required when the prosecutor elects the specific act on which the charged offense is based. (*Ibid*.)

B

Puckett asserts that although the jury found both he and Davis personally used firearms in assaulting Johnson and robbing Gomez, the record does not support the inference that two guns were pointed at either Johnson or Gomez and therefore the jury could not have unanimously agreed on the particular acts that constituted Puckett's alleged personal use of a firearm in those two offenses. However, the premise of Puckett's assertion is ill-founded. Pointing of guns at a victim is not required for a finding of personal use. Rather, an intentional menacing display is sufficient. (*People v. Wims*, *supra*, 10 Cal.4th at p. 302; *People v. Granado*, *supra*, 49 Cal.App.4th at pp. 322, 325.) Johnson testified that Puckett and the other men pointed guns outward as they entered the store. In the circumstances of this case, such a display of a firearm by Puckett before and during the time he assaulted Johnson is sufficient for the jury to find that he personally used a firearm in committing the assault. Puckett does not show that there were any other acts committed by him or any of the other men, including Davis, that could have provided a basis from which the jury could reasonably infer Puckett personally used a firearm in committing the assault on Johnson.

Similarly, the record supports the inference by the jury that Puckett and Davis each displayed a gun as they robbed Gomez. The record shows at least two men were

involved in robbing Gomez. Gomez tentatively identified Davis and Puckett as two of the robbers. Herrera testified that both men displayed guns. Johnson also identified Puckett as one of the men, and police found the silver and black Ruger pistol in the water near Puckett after the car chase. It could therefore be inferred that Puckett possessed and displayed the silver and black gun during the robbery of Gomez. As we discuss in part VIII., *post*, witnesses identified Davis as the other man who displayed the all-black Jennings pistol. Gomez testified that one of the robbers held a silver and black gun. Stella testified that the man behind Gomez pointed the silver and black gun in the general direction of Gomez and the three customers standing in her line. Sotelo testified that the other man pointed a black gun at Gomez. Therefore, contrary to Puckett's assertion, the record supports inferences that each of the two men pointed guns while Gomez was robbed and that Puckett was the man who pointed the silver and black gun in Gomez's general direction during the robbery. In the circumstances of this case, the display of a firearm by Puckett during the robbery of Gomez is sufficient for the jury to find that he personally used a firearm in committing the robbery. Puckett does not show that there were any other acts committed by him or any of the other men, including Davis, that could have provided a basis from which the jury could reasonably infer that Puckett personally used a firearm in committing the robbery of Gomez.

Because Puckett does not show there were other acts from which the jury could reasonably infer he personally used a firearm in committing his offenses, he has not carried his burden on appeal to show that the trial court erred by not instructing sua

sponte on unanimity with CALJIC No. 17.01. (*People v Melhado, supra*, 60 Cal.App.4th at p. 1534.)

VII

There Is Substantial Evidence to Support the Jury's Findings That Davis Personally Used a Firearm in Committing His Offenses

In Davis's supplemental brief, he contends there is insufficient evidence to support the jury's findings that he personally used a firearm in committing his offenses.

We conclude there is substantial evidence to support the jury's findings that Davis personally used a firearm in the commission of each felony of which he was convicted. Regarding Davis's conviction of assaulting Johnson, the record shows that Johnson identified Puckett as the man who pushed her down as he and one or two other men entered the store. Although Puckett, not Davis, was the man who actually pushed Johnson down, Davis was identified as one of the men who entered the store with Puckett. Johnson testified that each of the men pointed guns outward as they entered the store together. The jury could reasonably infer that Davis intentionally displayed a firearm in a menacing manner at the time he and Puckett assaulted Johnson or at the time he aided and abetted Puckett in assaulting her. It was not necessary that Davis point his gun directly at Johnson or personally push her down for the jury to find that Davis personally used a firearm in assaulting her. We conclude there is substantial evidence to support the jury's finding that Davis personally used a firearm in committing the assault on Johnson.

Regarding Davis's robbery conviction, the record supports the inference that Davis was one of the two men who displayed guns near Gomez when she was robbed. Johnson saw the men approach and rob Gomez. Gomez tentatively identified both Puckett and Davis as men who robbed her. One of the men was about one foot behind her and the other was three to four feet from her. Herrera testified that she saw two robbers, who both displayed guns. Thomas identified Davis as the man who held the all-black Jennings pistol. Also, Kienle tentatively identified Davis as the man who held a dark-colored or blue-steel gun. Sotelo testified that one of the men pointed a black gun at Gomez. The jury could infer from this evidence that Davis stood and displayed a gun near Gomez as Puckett approached her from behind and took her cash. Because the record supports an inference that Davis intentionally displayed a firearm in a menacing manner while Gomez was robbed, there is substantial evidence to support a finding that Davis personally used a firearm in the commission of the robbery. Although the record may also have supported an alternative inference that someone other than Davis may have committed the robbery, we construe the evidence favorably to support the judgment and make all reasonable inferences in support thereof.

Regarding Davis's conviction for assaulting Kienle, the record supports the inference that Davis was the man who pointed the gun at Kienle and ordered him to lie on the floor. Kienle tentatively identified Davis as the man who approached him in the beer department, pointed a dark-colored or blue-steel gun at him, and told him to get down. Kienle testified that the gun pointed at him was not silver or chrome-colored. Because the record supports an inference that Davis intentionally displayed a firearm in a

menacing manner while he assaulted Kienle, there is substantial evidence to support a finding that Davis personally used a firearm in the commission of that assault. Although the record may also have supported an alternative inference that someone other than Davis may have committed the assault,[23] we construe the evidence favorably to support the judgment and make all reasonable inferences in support of the judgment.

Regarding Davis's conviction for assaulting Thomas, the record supports the inference that Davis was the man who pointed the gun at Thomas and ordered her to lie on the floor. Thomas identified Davis as the man who approached her between checkstands three and four, pointed an all-black gun at her, and told her to get down. She testified that the all-black Jennings pistol found by police in the car near Davis was similar to the one that Davis pointed at her. Because the record supports an inference that Davis intentionally displayed a firearm in a menacing manner while he assaulted Thomas, there is substantial evidence to support a finding that Davis personally used a firearm in the commission of that assault. Although the record may also have supported an alternative inference that someone other than Davis may have committed the

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23 Davis argues that if he was one of the men robbing Gomez and keeping her customers at bay, then he could not have been the man who pointed the gun at Kienle in the beer department. However, the jury could reasonably infer that Davis initially helped Puckett rob Gomez, and after Gomez and her customers were lying on the floor Davis ran to the beer department and ordered Kienle to lie on the floor. He also argues he could not also have assaulted Kienle at the same time he allegedly assaulted Thomas. However, the record permits the inference that the assaults of Kienle and Thomas did not occur simultaneously.

assault,[24] we construe the evidence favorably to support the judgment and make all reasonable inferences in support of the judgment.

Regarding Davis's conspiracy conviction, the jury found one of the overt acts that Davis committed in furtherance of the conspiracy was that he "pointed a firearm at Lucky[] Supermarket employees and customers." Furthermore, the evidence supports an inference that Davis intentionally displayed a firearm in a menacing manner from the moment he entered the store with his coconspirator(s). Johnson testified that all of the men displayed guns as they entered the store. Thomas identified Davis as the man who pointed the all-black gun at her. Therefore, there is substantial evidence to support a finding that Davis personally used a firearm in committing the conspiracy offense.

The evidence is *not* "hopelessly irreconcilable as to each suspect's participation" in the robbery. Applying the substantial evidence standard of review, our review of the whole record in the light most favorable to the judgment shows that there is substantial evidence (i.e., evidence that is reasonable, credible, and of solid value) from which a reasonable trier of fact could find beyond a reasonable doubt that Davis personally used a firearm in committing his offenses. (*People v. Cuevas*, *supra*, 12 Cal.4th at pp. 260-261.)

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[24] Davis notes that Thomas testified she saw a man run toward the beer department shortly before Davis assaulted her. Davis argues that he could not have pointed a gun at Kienle in the beer department and simultaneously pointed a gun at Thomas. However, the jury could reasonably infer that Davis first ran to the beer department and pointed the gun at Kienle, and then approached Thomas and pointed a gun at her. The record permits the inference that the assaults of Kienle and Thomas did not occur simultaneously.

DISPOSITION

The judgments are affirmed.

McDONALD, J.

WE CONCUR:

HALLER, Acting P. J.

O'ROURKE, J.